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No. 92-906

In The

Supreme Court of the United States

October Term, 1992

BONNIE MOORE, ACCOUNTING CENTER, and CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,

Petitioners,

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE PETITIONERS AND BRIEF AMICUS CURIAE FOR THE PETITIONERS

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December 22, 1992

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Society of Public Accountants (NSPA) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent was requested by NSPA, but refused.

In the instant case, the petitioner has argued an array of meritorious points to the California Court, including a recital of the incompatibility of the decision below with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990). If the decision in the instant case is left standing, it could have a negative impact, on a national scale, on the First Amendment protections that this Court afforded commercial speech in *Peel*. It is believed that the brief which the proposed *amicus curiae* is requesting permission to file will provide a more complete argument and analysis of the issue of the proper application of *Peel* to the instant case. If this argument is accepted, it would be dispositive of this case, in the judgment of the proposed amicus.

Respectfully submitted,

December 22, 1992

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LIST OF PARTIES

The petitioners are Bonnie Moore, Accounting Center (a California Corporation) and the California Association of Independent Accountants. Respondent is the California State Board of Accountancy.

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BRIEF AMICUS CURIAE FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 2 Cal. 4th 999. A petition for rehearing was filed by petitioners and was denied on August 27, 1992. The decision of the intermediate California Court of Appeal was issued on August 1, 1990; and the order of that court denying petitions for rehearing filed by both sides and amending its original opinion was issued on August 29, 1990. The Statement of Decision issued by the

San Francisco Superior Court on March 16, 1989 is not reported.

JURISDICTION

The decision of the California Supreme Court was rendered on July 2, 1992. A timely petition for rehearing was denied on August 27, 1992. This brief is filed within 30 days of the filing of Petitioner's Petition for Writ of Certiorari. This Court has jurisdiction to review the decision of the California Supreme Court under 28 U.S.C. § 1257.

STATEMENT

The National Society of Public Accountants (NSPA), Amicus Curiae below and here, supports the Appellant's Petition for Certiorari. NSPA believes the California Supreme Court erred by finding that the terms "accountant" and "accounting" may not be used by non-certified accountants without an accompanying modifier or disclaimer. NSPA, as the national organization of accountants whose membership is not limited to certified public accountants, has an obvious interest in measures which seek to limit the use of these generic terms to certified public accountants to the detriment of other legally practicing accountants.[1]

[1] NSPA has 22,000 members and 52 affiliated state organizations (including the District of Columbia, the Virgin Islands and Puerto Rico).

At issue here is the validity of a regulation promulgated by the California State Board of Accountancy which, *inter alia*, called for an absolute ban on the use of the terms "accountant" and "accounting" by anyone other than an individual licensed by the Board.[2] The trial court upheld the State Board's regulation; however, the California Court of Appeal found the absolute ban on the terms to be contrary to established commercial speech doctrine. Unfortunately, the intermediate court declined to strike down the regulation, and instead essentially fashioned its own regulation by ruling that a non-certified accountant could only use the terms in conjunction with a disclaimer stating that the accountant was "unlicensed" or that his or her services do not require a license. Both parties sought reversal of the California Court of Appeal by the California Supreme Court. In a 4-3 decision, the California Supreme Court affirmed the decision of the Court of Appeals without any modification. *Moore v. California State Board of Accountancy*, 2 Cal. 4th 999 (1992). Subsequently, the California Supreme Court denied petitions for rehearing by a 4-3 vote.

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[2] California Business and Professions Code § 5058.

ARGUMENT

I

NSPA submits that the decision by the California Supreme Court is in direct conflict with this Court's decision in *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).[3]

Peel involved the legality of a prohibition by the Illinois bar authorities on an attorney's truthful use of the phrase "Certified Trial Specialist By the National Board of Trial Examiners" on his letterhead in a state which did not certify trial specialists. This Court found the sweeping prohibition invalid, and specifically refused to hold that a disclaimer requirement would be authorized. It recognized that the phrase at issue might be "potentially misleading", but found that "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public" (496 U.S. at 109). *Peel* suggested that, to the extent that a term may be misleading, the Court might be able to uphold a disclaimer specifically mandated *by the State* as constitutionally permissible. *Nowhere* in the majority opinion was it suggested that the courts were free to fashion their own disclaimer requirements in cases where the plain language of a

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[3] We believe that the other issues raised in Petition for Certiorari on behalf of Moore are also meritorious, and we do not mean to diminish their significance by focusing on *Peel*. Our purpose is to point out that the California Supreme Court's decision, in light of this Court's decision in *Peel*, could have an especially far-reaching and negative impact on the First Amendment protection that this Court has afforded to commercial speech.

regulation called for a complete prohibition on the use of certain terms.

In his dissent in *Peel*, Justice White asserted that the majority's action should have been more stringent. Basically, Justice White took the position that a disclaimer requirement could be read into the Illinois rule, thereby allowing the court to uphold the restriction and find against Peel on the basis of his failure to include such a disclaimer. However, Justice White did not cite any lower court opinion that reached such a result, nor was he able to persuade any other member of this Court to agree with his position (although three other Justices dissented on other grounds, see 496 U.S. at 119 *et. seq.*). Yet the approach advocated in Justice White's dissent, rejected by eight members of this court, was the approach that, in essence, was adopted by the California Supreme Court below. Therefore, we submit, the decision below is fundamentally flawed because it is inherently inconsistent with this Court's ruling in *Peel*, the case most directly on point.

II

The absolute ban on the terms is a constitutionally impermissible limit on a non-licensed accountant's freedom of speech, and the California Supreme Court's refusal to strike down the rule leaves open the possibility that other states may adopt similar prohibitions.

NSPA has an interest in the nationwide, uniform application of the First Amendment protection afforded commercial speech. The decision by the California Supreme Court, which lets the absolute ban on the terms stand, will affect not only accountants and their clients within that state, but, as a ruling by the highest court of the most populous state, may well influence other state

and federal courts, to the detriment of freedom of speech in a wide variety of circumstances. Moreover, this Court concluded in *In re R.M.J.* that an absolute ban on the phrase "Practice before: The United States Supreme Court" was "broader than reasonably necessary to prevent the perceived evil," 455 U.S. at 203. In *Peel*, even if the terms were found to be misleading, an absolute ban on the terms would be impermissible absent a showing that anything less would be inadequate. In any case, the NSPA submits that use of the generic terms "accounting" and "accountant" by non-licensed persons legally performing accounting services is not misleading, and therefore an absolute prohibition is not constitutionally acceptable "if the information is presented in a way which is not deceptive," *In re R.M.J.*, 455 U.S. 191, 203. The ruling below is inconsistent with this Court's well established teachings concerning the virtues of truthful commercial speech[4] and, we respectfully submit, beyond the authority of a state Supreme Court.

The circumstances of *Peel* are a virtual replication of those in the instant case, and the approach adopted below by the California Supreme Court was, for all practical purposes, the position taken by one Justice in a dissent in *Peel*. This position was specifically negated by the majority of this Court and, in fact, was not adopted by *any* other member of this Court. The decision rendered by the California Supreme Court is inconsistent with the law of the land as enunciated by this Court in *Peel*.

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[4] See, *e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, (1975) 425 U.S. 748 and *Bates & O'Steen v. State Bar of Arizona*, (1977) 433 U.S. 350.

CONCLUSION

We urge this Court to grant the Appellant's petition for certiorari in order to review and reverse the decision of the California Supreme Court and protect the right of unlicensed accountants, concerning commercial speech under the First Amendment, to make truthful statements about their lawful services. While a legislative body, within constitutional boundaries, may require certain disclaimers in commercial speech by its legislative process, which provides opportunity for citizen input by those who would be affected, the court below reached beyond its province when it imposed disclosure there. There was no occasion for non-licensed accountants or the general public who make use of their services to respond to the court's imposition of the disclosure. The court's mandated language, therefore, should be clearly rejected.

Respectfully submitted,

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